

No. 46241-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA L. HUNTER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Did the trial court erroneously deny Hunter's mid-trial request to proceed pro se?

II. STATEMENT OF THE CASE

On August 17, 2013, around 1:40 a.m., Lewis County Sheriff's Deputy Sue Shannon and Morton Police Officer Perry Royle were riding together in Deputy Shannon's patrol car, returning to Morton after a call out to the Ashford/Mineral area.¹ RP 27, 32, 35, 38, 69-70. Deputy Shannon was in a standard deputy's uniform and driving a fully marked patrol car equipped with lights and a siren. RP 33-34. As they were driving south down SR 7, Deputy Shannon and Officer Royle saw a car off on the shoulder, parked with its break lights on. RP 35. Deputy Shannon noticed the car because it was a dark and remote place to park, which was odd. RP 35. Officer Royle was able to get the license plate of the car and ran it through the system. RP 36. The car came back as registered to Joshua Hunter. RP 36

As Deputy Shannon continued to drive, Hunter pulled his car back onto the highway and began to drive very slowly behind Deputy Shannon. RP 36. Concerned, when she got to the bottom of

¹ The State will refer to the verbatim report of the jury trial, which is sequentially paginated, as RP. Any other verbatim report of proceedings will be cited as RP and the date.

SR 7, Deputy Shannon pulled into a parking lot of a lumber mill and blacked out all of the lights on her patrol car and waited for Hunter to drive by. RP 36-37. When Hunter's vehicle came back into view he was driving approximately 10 to 15 miles per hour (mph). RP 38. That stretch of road is a 55 mph zone which reduces to a 35 mph zone. RP 38. Hunter had also blacked out all the lights of his vehicle and he continued towards Morton. RP 38, 70. Hunter had to drive up a slight elevation to go over a set of railroad tracks and appeared to be having difficulty. RP 39. Hunter would accelerate the car, stop, accelerate, and then stop again. RP 39. Deputy Shannon decided to turn on all of her patrol car's lights and initiate a traffic stop on Hunter. RP 39.

Deputy Shannon followed Hunter for four blocks. RP 40. Hunter was driving between five and 10 mph. RP 40. When Hunter stopped the car the driver's door immediately swung open. RP 40. Officer Royle ordered Hunter to get back in the car. RP 41. The officers could see that Hunter was not wearing clothing from the waist up. RP 41, 70. Hunter stuck his head out of the driver's side door and waived at the officers. RP 70. Hunter was elated, happy and smiling. RP 42. In a high pitch voice Hunter said, "Hello. Hello. I just wanted to stop and say hello. Okay. Hello. I have to go now."

RP 42. The car was still running. RP 43. Because of Hunter's bizarre behavior, he was also flushed and sweating profusely, Deputy Shannon asked Hunter to step out of the vehicle. RP 42-43, 71. After a number of requests Hunter finally stepped out of the vehicle and the officers could see he was completely naked. RP 44, 71-72.

Deputy Shannon asked Hunter to come to the back of the car and told him she would get him a blanket or some clothes. RP 44. Deputy Shannon repeated the request several times. RP 44, 71-72. Deputy Shannon asked Hunter if he was having some type of problem and he told her he was having issues with God but that he had a conversation with God and they had worked it out. RP 45. Hunter then told officers that he needed to go home. RP 45. Deputy Shannon told Hunter he was not free to leave. RP 45, 72. Hunter got back in the driver's seat and Deputy Shannon warned Hunter that he needed to comply or he would be tased. RP 46, 72. Hunter did not comply, he revved the engine and Deputy Shannon deployed her taser, which only hit Hunter with one probe. RP 47, 72. Hunter said, "Ow. Why did you do that?" RP 7. Then Hunter stomped on the gas, put the pedal to the floor, put the car in drive

and took off. RP 49, 73. Deputy Shannon had to jump out the way in order to not get run over by Hunter as he drove off. RP 49, 73.

Hunter drove through a stop sign without stopping as he drove away from the officers. RP 49-50. Hunter was driving about 40 mph in a 25 mph zone. RP 49-50, 74. Deputy Shannon and Officer Royle got back into the patrol car, turned on the siren and took off after Hunter. RP 49-50. Hunter headed eastbound on SR 12. RP 51. Deputy Shannon was able to get within six car lengths of Hunter. RP 51. Hunter was driving 80 mph in a 55 mph zone. RP 51. Hunter next passed a vehicle in a double yellow no-passing zone. RP 51. Hunter varied his speeds; he would speed up then slow down. RP 52. Hunter also drove in the oncoming lane of travel for a quarter to a half mile. RP 52-53. There were no other officers available to assist and Deputy Shannon was told to terminate the pursuit by her sergeant when she got to Packwood. RP 53,

A driver's license return on Hunter showed a Yakima address for Joshua Lane Hunter. RP 52. Deputy Shannon contacted Yakima County and Yakima State Patrol and informed them she believed a DUI (Driving Under the Influence) was heading their way along with Hunter's information. RP 54.

The State charged Hunter by amended information with Count I: Attempting to Elude Pursuing Police Vehicle and Count II: Driving Under the Influence. CP 1-2. At trial confirmation on April 3, 2014 Hunter requested a new attorney. RP (4/3/14) 2. Hunter told Judge Hunt, "I don't feel that I'm being represented to the full ability of the court. I don't feel my representative is representing me to his full ability." RP (4/3/14) 2. Hunter expresses that he believed his trial counsel was holding something back. RP (4/3/14) 2. Hunter told the trial court he was having difficulty getting into contact with his attorney and he did not understand exactly what was occurring in court. RP (4/3/14) 2-3. The trial court denied Hunter's request for new counsel, confirmed trial and told Hunter he was free to hire his own attorney. RP (4/3/14) 3-4.

On the morning of trial after the jury was selected the trial judge, Judge Lawler, and Hunter had the following discussion:

MR. HUNTER: I just don't feel that I'm being represented to the best of my attorney's ability. I don't know what's going on here when I go to court. We go to court, we come in here, you know, this last time is alibi, I'm signing the papers, you know, before we've even read them. And I'm feeling like that today I'm asking where we're going with this thing and he's giving me another story. I don't see where we're going.

THE COURT: Well, you've got –

MR. HUNTER: I know -- I know today's the trial day.

THE COURT: Right. You've got the lunch hour. You can go through with Mr. Groberg again the police reports. If there is any question about what you think the testimony might be and what you think your testimony is going to be, you can talk to Mr. Groberg about that. He'll review all of that. That's why we're not starting up until 1:30, so that will give you time to do those things. I'll tell you Mr. Groberg is a good attorney. He's done a lot of these trials. He knows what he's doing. So you would do well to listen to him.

MR. HUNTER: Okay. Well....

THE COURT: So that's all for now. We'll be back at 1:30.

RP 18. The taking of testimony commenced. See RP 27. The State put on its case. RP 27-76. After the close of the State's case Hunter's trial counsel argued the trial court should dismiss Count I, the DUI, for insufficiency of the evidence. RP 77. The trial court denied the motion. RP 79. After the trial court denied the motion Hunter spoke up and said there was some questions he wanted to ask the officers that his attorney did not ask. RP 79. The trial court explained to Hunter that his attorney knew what he is doing and he knows what questions can and cannot be asked. RP 79. The trial court suggested that Hunter rely on his attorney's advice but that he could talk to his attorney about the issue. RP 79-80.

Hunter testified at length. RP 81-117. Hunter's trial counsel proposed a duress instruction, which the State objected to and the

trial court rejected. RP 119-24. On the second day of trial, after exceptions and objections to the jury instructions were taken Hunter had yet another discussion with Judge Lawler about his trial counsel's failure to ask certain questions. RP 128-29. Hunter expressed a desire to cross-examine the witnesses pro se. RP 128-29. Hunter then stated he would like to fire his attorney and represent himself. RP 129. The trial court stated, "No. We're not going to do that. We're not going to do that now in the middle of this trial." RP 129. There was further discussion and ultimately the trial court explained that Hunter's side of the story came out through Hunter's extensive testimony. RP 130-33.

The jury found Hunter guilty of Count I: Attempt to Elude a Pursuing Police Vehicle but found him not guilty of Count II: DUI. RP 168; CP 4-5. Hunter was sentenced to 22 months in prison. CP 10. Hunter timely appeals his convictions. RP 17-28.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED HUNTER'S REQUEST TO PROCEED PRO SE AFTER THE CLOSE OF EVIDENCE DURING HIS TRIAL.

Hunter argues that the trial court violated his constitutional right to represent himself in a criminal proceeding when it denied his unequivocal request to represent himself after the close of evidence but prior to closing arguments. RP 13-21. Hunter acknowledges that the request was after both sides had rested but argues the request was timely because Hunter did not ask for a continuance and was not seeking to delay the trial. RP 18-21. While the State concedes that Hunter's request to represent himself was unequivocal, the request was not timely. The trial court did not abuse its discretion when it denied Hunter's request to finish the proceedings appearing pro se.

1. Standard of review

Denial of a request by a defendant to self-represent is reviewed for abuse of discretion. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). A trial court abuses its discretion if its decision is manifestly unreasonable, applies an incorrect legal standard, or relies on unsupported facts. *Coley*, 180 Wn.2d at 559 (internal quotations and citations omitted).

2. The Trial Court Did Not Abuse Its Discretion When It Denied Hunter's Request To Self-Represent Because The Request Was Not Timely.

The Sixth Amendment grants a criminal defendant the right to self-representation. *Faretta v. California*, 422 U.S. 806, 572-74, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Faretta*, 422 U.S. at 572-73. The Washington State Constitution also expressly guarantees a criminal defendant the right to self-representation. *State v. Breedlove*, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995). The right to self-representation “is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010), citing *Faretta* 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002). An improper denial of the right to self-representation cannot be harmless and requires reversal. *Madsen*, 168 Wn.2d at 503; *Vermillion*, 112 Wn. App. at 851, citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

The trial court is “required to indulge in every reasonable presumption against a defendant’s waiver of his or her right to

counsel.” *Madsen*, 168 Wn.2d at 503 (internal quotations and citations omitted). A defendant does not have an absolute or self-executing right to proceed pro se. *Id.* at 504. When a defendant makes a request to proceed pro se the trial court first must determine whether the request is timely and unequivocal. *Id.* If the trial court finds the request is unequivocal and timely it must then determine if the waiver of the right to counsel is knowing, voluntary and intelligent. *Id.* If the court finds the request to self-represent “untimely, unequivocal, involuntary, or made without a general understanding of the consequences... [s]uch a finding must be based on some identifiable fact...” *Id.* at 504-05. It is not proper for a judge to deny a request to self-represent out of concern for the defendant’s competency because if the trial court doubts a defendant’s competence the court needs to take the necessary action in regards to a competency review. *Id.* at 505. Further,

A court may not deny a motion for self-representation based on the grounds that self-representation would be detrimental to the defendant’s case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant was represented by counsel.

Id.

The State concedes that Hunter's request to represent himself was unequivocal. Hunter clearly stated he wanted to fire his attorney and proceed pro se. RP 129.

MR. HUNTER: Okay. He didn't ask them one question I asked him. They're pretty vital to my case.

THE COURT: Well, we're done with that. Now we're going to bring the jury in, I'm going to read the instructions, and then we'll hear closing arguments.

MR. HUNTER: Okay. Will I get to present my own closing argument?

THE COURT: No. Your attorney is going to do that.

MR. HUNTER: Okay. I'd like to fire my attorney, --

THE COURT: Well, you don't have that --

MR. HUNTER: -- represent myself.

THE COURT: No. We're not going to do that. We're not going to do that now in the middle of this trial.

RP 129. Therefore, the only inquiry to be made here is, did the trial court abuse its discretion when it determined Hunter's request was not timely?²

The trial court did not abuse its discretion when it determined the request was not timely. When it comes to timeliness of the

² While Hunter states he has been trying to represent himself since the beginning any previous discussion about his counsel does not qualify as an unequivocal request to proceed pro se. RP 129. Hunter does not claim on appeal that his prior attempts to fire his attorney were unequivocal requests to represent himself in the proceedings.

request to proceed pro se the reviewing courts look at the right to self-representation on a continuum. *Breedlove*, 79 Wn. App. at 107.

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978) (internal citations omitted). This Court has previously explained that the trial court must balance a person's "interest in self-representation and society's interest in the orderly administration of justice." *Breedlove*, 79 Wn. App. at 107. Prior to trial the defendant's interest is paramount, but as time continues the interest in orderly administration of justice, especially once trial has commenced, becomes weightier. *Id.*

Hunter claims the trial court failed by not doing a sua sponte meaningful review that would preserve Hunter's request to self-represent for review. Brief of Appellant 20. This is not correct. *Fritz* sets out the factors the trial court should consider when there is a

midtrial request by a defendant to self-represent. *Fritz*, 21 Wn. App. at 363 (internal quotation and citations omitted).

When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request.

Id. The trial court did the required inquiry and determined that it would not allow Hunter to self-represent for the remainder of the trial. RP 128-33.

The trial court discussed with Hunter the quality of his representation. The trial judge stated,

Your attorney knows what he's doing. There are questions that can be asked. There are questions that cannot be asked. There are reasons for those questions that he asked. There are reasons why, there are rules that prohibit certain questions from being asked.

RP 130. The trial judge explained that he could not conceive of any questions that could have been asked to get more information than was testified to. RP 130. Later the trial judge also commented,

And you gave that testimony. You said that that never happened. You told the jury that. All right? So anyway, your version of the events is squarely before the jury. You gave a lot of testimony yesterday.

RP 132. The trial judge noted the reason for Hunter's request, which was discussed in detail. RP 128-32. Hunter was dissatisfied with the questions his attorney had asked the witnesses. RP 128-32. The trial judge demanded to know what questions Hunter felt were not asked on cross-examination. RP 131. Hunter then went on to explain that Deputy Shannon's testimony was incorrect, that what she testified to did not happen. RP 131. The trial judge then told Hunter that he had testified at length and the jury heard Hunter's version of the events. RP 131-32.

You -set it out in great detail that it happened differently than what the officers testified about. So your story is in front of the jury. That was all brought out between the questions that Mr. Groberg asked and the testimony that you gave. It's all there.

RP 133. This was the second day of the trial, all of the testimony had been taken, jury instructions had been compiled and all that was left was reading instructions to the jury and closing argument.

RP 119-24, 128-32. The trial judge stated that the time for testimony and cross-examination was over. RP 129.

MR. HUNTER: Okay. He didn't ask them one question I asked him. They're pretty vital to my case.

THE COURT: Well, we're done with that. Now we're going to bring the jury in, I'm going to read the instructions, and then we'll hear closing arguments.

RP 129. The trial judge outlined specific facts when he denied Hunter's request for self-representation as not being timely.

While Hunter was not asking for a continuance and it is clear his intention was not to unnecessarily delay the proceedings (he was dissatisfied with his attorney's cross-examination of the witnesses) those are not the only factors the trial judge is to consider during his inquiry and decision to allow self-representation once trial has commenced. *Fritz*, 21 Wn. App. at 363. The trial judge looked at several factors and determined he would not allow Hunter to self-represent for closing argument. RP 128-32. The trial court did not base its denial of Hunter's request on an incorrect legal standard or unsupported facts. *Coley*, 180 Wn.2d at 559. Nor was the trial court's decision manifestly unreasonable. *Id.* The trial court therefore, did not abuse its discretion when it denied Hunter's request to self-represent. This Court should affirm Hunter's conviction.

IV. CONCLUSION

The trial court did not abuse its discretion when it denied Hunters mid-trial request to represent himself for closing argument. This court should affirm Hunter's conviction.

RESPECTFULLY submitted this 9th day of March, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'JLM', written over a horizontal line.

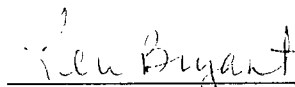
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. JOSHUA L. HUNTER, Appellant.	No. 46241-9-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 9, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lisa E. Tabbut, attorney for appellant, at the following email address: Lisa.Tabbut@comcast.net and ltabbutlaw@gmail.com.

DATED this 9th day of March, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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